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IN THE

Supreme Court of the United States

No. 969 TERM, 19

IRVIN RAPOPORT,

Petitioner,

vs.

ROSE RAPOPORT, also known as JOAN SIROTT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

TERM, 1969 No.

IRVIN RAPOPORT,

Petitioner,

vs.

ROSE RAPOPORT, also known as JOAN SIROTT,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Irvin Rappoport prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in the above entitled case filed August 20, 1969.

Opinions Below

The Majority Opinion of the United States Court of Appeals for the Ninth Circuit was filed August 20, 1969. It is appended to this Petition as Appendix A. The Dissenting Opinion of the said Circuit Court of Appeals, originally filed on August 20, 1969 and revised and filed November 4, 1969 is appended to this Petition as Appendix B.

Jurisdiction

The Majority Opinion (Appendix A) and Judgment (Appendix C) of the United States Court of Appeals for the Ninth Circuit, filed on August 20, 1969, reversed the Order of the United States District Court for the District of Nevada and remanded the cause with directions to said Court to dismiss the action for lack of jurisdiction. On November 18, 1969, Honorable William O. Douglas signed an Order extending time to file petition for Writ of Certiorari. This Order extended the time to file this petition to and including December 18, 1969.

The jurisdiction of this Court is conferred by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. §1254, which provides for appeal from cases in the courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Questions Presented

1. Should not the Court resolve the Constitutional question, *never previously ruled upon by it*, as to whether a Permanent Decree of Injunction, which was the first final decree entered by a state court possessing jurisdiction in personam over both parties and over the subject matter and which constituted a final judgment in every respect under the laws of that state, is entitled, like every other final judgment of similar stature, to Full Faith and Credit in every other jurisdiction under Article IV, Section 1 of the Constitution of the United States?

2. Where the rights of the parties in specific property admittedly amounting to $25,000 are adjudicated in such

decree, and a subsequent decree issued ex parte – arising from the same subject matter in a second suit between the same parties in another jurisdiction – flatly purports to alter that adjudication, does not the finding by a Federal court, in an action for Declaratory Judgment to test the respective validity of the conflicting decrees, that these property rights are "collateral" to the Federal issue on the ground *that the state decrees accomplished the change, which a Federal declaration of validity cannot correct,* in effect overrule the decision of this Court in *Sutton v. Leib,* 342 U.S. 402, 72 S. Ct. 398 (1952)?

(Answered in the negative by necessary implication by the Majority Opinion of the United States Court of Appeals for the Ninth Circuit)

3. In such Federal action, brought to seek extra-territorial recognition for the first final decree governing marital status *(which specifically includes disposition of these property rights)* is not refusal to accept jurisdiction on the above grounds in basic conflict with the decision of the Second Circuit in *Southard v. Southard,* 305 F (2d) 730 (2 Cir. 1962)?

(Answered in the negative by necessary implication by the Majority Opinion of the United States Court of Appeals for the Ninth Circuit)

4. In arriving at a conclusion as to the existence of the requisite amount in controversy, is not the Federal court bound to apply the law of the state where the property, which is claimed to constitute this value, is located?

(Answered in the negative by necessary implication by the Majority Opinion of the United States Court of Appeals for the Ninth Circuit)

Constitutional Provision Involved

Article IV, Section 1, Constitution of the United States: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . ."

Statement of the Case

On December 19, 1963, *respondent* instituted an Action for Divorce in Montgomery County, Pennsylvania (Record on Appeal in Court of Appeals [hereinafter referred to as "C.A."], p. 263) alleging in her Complaint both her residence and that of petitioner in said county (C.A. 265). On January 9, 1964 an Appearance and Warrant of Attorney was filed for petitioner (as defendant therein) (C.A. 276-280); and on that same date petitioner ruled his wife for a Bill of Particulars (C.A. 281). On February 24, 1964 she filed a Petition seeking alimony pendente lite, to which he responded on February 26 by filing an Answer alleging that she had removed from the common domicile (C.A. 289) (where they had lived with two teen-age children) in order to "live with her paramour, one George Sirott" and that since the institution of the suit, she and Sirott had "been living together in open, notorious adultery" and that he was supporting her "more than adequately," being "a wealthy man" (C.A. 290).

On the basis of this Answer, the Court on March 30, 1964 ordered depositions to be taken within 90 days (C.A. 283) and *petitioner*, on April 2, 1964, promptly noticed his wife for the same, to be held on April 6, 1964 (C.A. 293). She responded by filing a Motion for Protective Order on April 3, 1964 to avoid being deposed. Inspection of this

document (C.A. 303, 304) does not disclose any claim *that she had already moved to Reno and intended to live there,* although such reason might have defeated the taking of her depositions *and in her Nevada suit for divorce, she claimed Nevada residence since March 25, 1964* (C.A. 29), *nine days earlier.*

On April 17, 1964, counsel for both parties agreed to continue this Motion to May 1, 1964 (C.A. 302), on which date, petitioner having previously filed an Answer thereto (C.A. 297-300), the Court, on appearance of both counsel, ordered this Motion also on the Argument List after the taking of depositions. *Up to this latter date, in an action less than five months old and already filled with pleadings and court appearances, not one word suggested that respondent was not within the jurisdiction of the Commonwealth of Pennsylvania.*

Nevertheless, six days later, on May 7, 1964, she commenced an action for divorce in Reno, Nevada (C.A. 29) (even though the foregoing record makes it abundantly clear she was actively pressing her Pennsylvania action during the alleged *prior* six-week residence in Nevada).

Petitioner was not served nor did he appear personally or by counsel in the Nevada action (C.A. 157). Instead, he filed a Complaint in Equity in Pennsylvania seeking an injunction to restrain his wife from proceeding with the Nevada suit, and secured a Preliminary Injunction on May 20, 1964 on his affidavit setting forth all the foregoing facts (C.A. 194-196) just two days after he received his wife's Nevada Complaint in Divorce in the mail (C.A. 200).

Service of the Preliminary Decree was made upon respondent at her Pennsylvania residence; on her Pennsylvania attorney in the divorce action personally and on her attorney in Nevada divorce action by certified mail. The Pennsylvania court having fixed June 24, 1964 as the date

for a hearing on the merits, notice of this hearing was served as before (C.A. 217, 218, 229, 230, 241-243). On that date, respondent not being present, petitioner testified and produced his wife's letters postmarked March 31, April 28 and May 6, 1964 from New Jersey (Exhibits 15-17), the first two bearing, in respondent's handwriting, her Pennsylvania residence as the return address. The Court thereupon concluded that the evidence sustained petitioner's averments and established not only the existence of a prior and pending action on the same subject matter, but respondent's fraudulent attempt to secure a false but colorable residence in Nevada; and entered a Permanent Decree enjoining her (in six sections) from pursuing her Nevada divorce, or from interfering with her husband's marital and property rights. With respect to the latter, she was enjoined specifically

> "(f) from doing or causing to be done anything which will alter or modify title to premises 612 Fariston Drive, Wynnewood, Montgomery County, Pennsylvania, said title being presently held by Irvin Rapoport and the said defendant, Rose Rapoport, as tenants by the entireties." (C.A. 245)

The Court did not merely "confirm" or "continue" the temporary injunction; it entered an entirely new Decree (C.A. 244, 245).

Service of this Permanent Decree was made upon defendant by physically handing the same to her in Reno (C.A. 262), the Majority Opinion of the Court of Appeals to the contrary notwithstanding (Appendix A [1]).

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[1] The temporary injunction was served upon "Rose by serving her attorney of record in her Pennsylvania divorce suit and by sending her in Nevada a copy of the complaint . . ." (Upon final hearing) "the Pennsylvania court issued an injunction in accordance with Irvin's prayer, *and copies of the decree were served in a manner similar to that of the initial summons and complaint.*"

Two days later, respondent received an ex parte Nevada divorce. That same day she went through a marriage ceremoney with Sirott at which her Nevada attorneys were her witnesses (Exhibit 12).

As a result, petitioner instituted his Action for Declaratory Judgment, averring specifically (a) Pennsylvania's prior jurisdiction over both parties and over subject matter; (b) the prior, valid and final Pennsylvania Decree of Injunction and its entitlement to Full Faith and Credit, with the resultant *res judicata;* and (c) the consequent nullity of the Nevada decree and violation of Due Process arising therefrom (C.A. 5-8). Attached as an exhibit to the Complaint was a copy of the Permanent Injunction, including sub-paragraph (f) hereinbefore noted (C.A. 12); hence petitioner's claim for protection of title to his property has been in his case since the filing of the initial pleading in the Federal District court for the District of Nevada.

That trial court, entertaining doubts as to the presence of the requisite amount in controversy, entered an order on September 13, 1966 (C.A. 85, 86) requiring petitioner to submit authorities to substantiate his claim to federal jurisdiction in this respect.

Petitioner promptly filed not only a legal memorandum supporting his position, but an affidavit which was accepted by the court and which stated, *inter alia* (C.A. 95, 96):

> ". . . that as long as he retains title to said premises as a tenant by the entireties with defendant as his wife, *he has an indivisible one-hundred percent interest in the said sum of approximately Twenty-Five Thousand* ($25,000.00) *Dollars* . . . ; that in the event, however, the said marriage shall be terminated by divorce, then under the Act of May 10, 1927, P.L. 884, 68 P.S. 501 et seq" (of Pennsylvania) ". . . the nature of the title held thereto is changed to a tenancy in common as between the parties, . . . *that your deponent would, in this latter event,*

suffer . . . the loss of almost Twelve Thousand, Five Hundred $12,500.00) *Dollars to himself personally,* which loss would be irreparable; . . ." (Emphasis supplied)

Respondent's memorandum and affidavit supported the foregoing statements (C.A. 97-100); and the trial court, in denying respondent's Motion to Dismiss or for Summary Judgment on July 5, 1967 (C.A. 106-108) by necessary implication found the requisite amount in controversy to be present.

Trial on the merits took place on July 31, 1967; the only fact issue being the subsidiary one of respondent's domicile between March 25 and May 7, 1964 (subsidiary because no challenge, by pleadings or otherwise, to the accuracy and regularity of the records establishing Pennsylvania's prior jurisdiction over the persons of both parties and over the subject matter, and the permanent decree of injunction it entered, based on the same—C.A. 179-306—was ever made by respondent). This single issue was accordingly tried.

The trial resulted in the filing, on August 23, 1967, of an Opinion and Decision that federal jurisdiction existed in the case at bar (C.A. 156) but that Nevada had jurisdiction to grant a valid divorce in spite of the Pennsylvania injunction, and the marriage had been legally dissolved (C.A. 156-162). From the latter findings petitioner appealed to the Court of Appeals for the Ninth Circuit on September 18, 1967.

Following filing of briefs by both parties with that Court in accordance with its rules (all briefs being included with the record herein), oral argument took place on December 12, 1968. At this argument, the question of amount in controversy being raised by the Court on its own motion (in spite of the undenied and substantiated averments concerning the same noted *supra,* this Petition), both parties supplied supplemental briefs on the point, which was

deemed submitted on December 24, 1968.

Eight months later, on August 20, 1969 the Majority Opinion of the above Court of Appeals reversed and remanded the case to the District Court with instructions to dismiss the action for lack of jurisdiction because (a) property interests were involved only collaterally; and (b) even if they were directly involved, "the interest . . . was not shown to be worth $10,000 or more."

Petitioner seeks review of this decision and judgment.

Basis for Federal Jurisdiction

This was an action for declaratory judgment brought pursuant to the Act of June 25, 1948, c.646, 62 Stat. 964, as amended, 28 U.S.C. Section 2201. Jurisdiction was founded upon diversity of citizenship. Act of June 25, 1948, c.646, 62 Stat. 930, as amended, 28 U.S.C. Section 1332.

ARGUMENT

1. So certain is petitioner that the Majority Opinion of the Court of Appeals (and the judgment it rendered thereon) can be swiftly demonstrated to be unsound, on both legal and logical grounds, that he will proceed at once to consideration of the most compelling reason, in his view, why his petition should be granted by your Honorable Court. The demonstration will follow.

Raised squarely by all of the pleadings and facts of this case is the question: Is a permanent decree of injunction regularly entered by a state court sitting in equity, possessing jurisdiction over *both* of the parties and subject matter of a marital dispute (*which decree is the first final judgment* entered in connection with that subject matter) entitled to Full Faith and Credit in every other jurisdiction under Article IV, Section 1 of the Constitution of the United States?

It is respectfully submitted that this constitutional question has not, to date, been passed upon by this Court, and therefore presents a case of first impression. It is further submitted that the answer to this question, based of necessity on the application of fundamental principles of constitutional law, will directly affect legal practice in the handling of marital disputes throughout the nation. Consideration of this question, then, presents this Court with a unique opportunity to reduce further the gray area still existing in conflict between the so-called "divisible divorce" concept and the Full Faith and Credit rule.

A brief glance at the development of our case law on the subject brings into sharper focus the importance of the question. This has been succinctly stated by Freedman.[2]

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[2] 3 Freedman, *Marriage and Divorce in Pennsylvania*, 787, p. 1438 (2d Ed. 1957).

"The coincidence of jurisdiction with full faith and credit has come to affect the validity in the decree-granting state of a divorce not entitled to full faith and credit elsewhere. In the second *Williams* case and the *Esenwein* case the divorces were refused recognition because North Carolina and Pennsylvania, respectively, found that the alleged domicile in Nevada was not *bona fide*. But there was no implication in either case of the invalidity of the decree in Nevada. And so it was assumed that the recent decisions of the Supreme Court of the United States left unimpaired the validity of a divorce—and a subsequent remarriage—in the decree-granting state. The problem was decided by the Supreme Court of the United States in *Sutton v. Leib*."

Sutton v. Leib, 342 U.S. 402, 72 S. Ct. 398 (1952) was exhaustively reviewed and analyzed in petitioner's Opening Brief filed with the Court below.[3] Suffice it to say that the *Sutton* case not only declared that New York decrees (entered by a court with jurisdiction over both parties) for separate maintenance (brought by a first wife) and annulment of marriage (brought by the second) were *res judicata* and therefore unassaiable collaterally, but were entitled to Full Faith and Credit "throughout the Nation, in Nevada as well as Illinois," *in the face of a prior ex parte Nevada decree of divorce*. And the test set forth for such extraterritorial recognition was *the jurisdiction of the court over the persons of the parties.*[4]

It is crystal clear that the instant Pennsylvania Permanent Decree would have the same legal effect as both of the *Sutton* New York decrees combined, and was, moreover, entered *before* the Nevada *ex parte* divorce decree. There-

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[3] Appellant's Opening Brief, pp. 34-39.

[4] *Sutton v. Leib, supra,* at pp. 408-409: "If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of (X) and his first wife, its decree of divorce would have been unassailable in other states."

fore, the only conceivable distinction, sound or otherwise, between *Sutton* and the case at bar, was that the decree of a chancellor in equity is involved here, as opposed to judgments entered in an action at law in the *Sutton* case. This was the flat conflict of law at issue in the instant case.

Neither of the courts below were prepared to rule on this question.

The District Court for the Federal District of Nevada, by validating the later *ex parte* Nevada divorce, did indeed, by necessary implication, hold the Pennsylvania decree was not entitled to extraterritorial recognition (*while at the same time admitting that Pennsylvania had personal jurisdiction over respondent:* C.A. 159), but without ruling on the applicability of *Sutton v. Leib,* which it ignored entirely. The Court of Appeals, by a Majority Opinion determining that it lacked jurisdiction over the controversy,[5] evaded the entire question.

Petitioner has always maintained, of course, that a Permanent Decree of Injunction issued in equity is (and ought to be) entitled to compulsory recognition like any other judgment of like stature, as desirable from a jurisprudential standpoint,[6] and has cited authorities[7] in support of its legal basis.

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[5] *Under factual circumstances* that place it in conflict with *Southard v. Southard,* 305F (2d) 730 (2 Cir. 1962). See *infra.*

[6] "A finding in appellee's favor would be tantamount to advising the American bench and bar at large that the entire corpus of long-developing principles and case law supporting the issuance of injunctions to restrain unfair litigation in foreign states is to be jettisoned in its entirety; for, if an injunction possessing all of the attributes of the instant decree is not entitled to mandatory recognition, it is impossible to conceive of one that would be . . . Such a result, then, would have a most sweeping and . . . disastrous effect on legal practice, without any offsetting legal virtue." Appellant's Reply Brief, pp. 18, 19.

[7] Barbour, Goodrich, and Restatement of the Law, *Conflict of Laws,* Appellant's Reply Brief, pp. 17, 18.

2. Petitioner has noted that the Majority Opinion of the Court of Appeals found that Federal jurisdiction was lacking in the case at bar. This was based on two conclusions: that the property interest involved (the home of the parties) was only involved in the declaration sought "collaterally and not directly, and" (in any event) "was not shown to be worth $10,000 or more." (Appendix A)

The first conclusion draws our attention at this point. The reasoning of the Majority Opinion is:

> "A decree of divorce may change the nature of the parties' tenancy, but nothing in the Pennsylvania law suggests that a federal declaration of marital status has any such effect . . . A federal decree declaring that the Nevada decree is valid could not affect the title at all. The Nevada decree accomplished the change, and not the federal decree. A federal decree declaring that the Nevada decree was void has no necessary effect on title. The Pennsylvania law obviously gives effect only to valid divorce decrees. If a divorce decree is void, it is a complete nullity from its outset . . . and a federal court's saying so does no more than state a condition which existed all along . . . *Even if the federal court could have adjudicated the interests of the parties in the real property,* a dubious assumption, *it was not asked to do so in this case. The only matter directly in controversy was the validity of Rose's divorce.*" (Emphasis supplied).

Petitioner respectfully submits that this analysis will not stand inspection, for two reasons (the second of which is critical, in connection with the basis for granting a Writ in this matter):

(1) *The assumption is false that the court was not asked to adjudicate the interest of the parties in the real property.* In his original action for declaratory judgment filed with the trial court below, petitioner not only set forth his property rights and the cloud upon the title to which the Nevada decree placed that property (Paragraphs VI, XVIII, XXV

and XXVI (C.A. 3, 6, 8), *but attached the Pennsylvania Permanent Decree as an exhibit* (C.A. 11, 12); *and asked, by way of relief, that full recognition be accorded this decree* (C.A. 8). As we have already noted (Statement of the Facts, p. 6 *supra*, this Petition), *the Decree itself specifically forbids alteration or modification of the title to the property, and title to that property will therefore, of necessity,* be affected by the decree's extra-territorial validity or lack of it.

A court may not pick and choose portions out of a decree submitted for recognition under Article IV, Section 1 and ignore the balance: if recognition is to be accorded, it is *full* faith and credit, not just some: *Davis v. Davis,* 305 U.S. 32, 59 S. Ct. 3 (1938).

In short, one of the reasons why the property interest is not collateral is that *it is imbedded in the very decree whose recognition is being sought* in this action.

(2) The second reason why the Majority analysis is unsound is, in petitioners' view, of overriding importance.

It will be noted that this analysis is inherently self-defeating. If the Nevada decree is valid, says the Majority, there is nothing we can do about that—the Nevada decree did it. If the Pennsylvania decree is valid, we can't change that either, because Pennsylvania decrees are valid in Pennsylvania. This might mean that the Nevada decree has no effect in Pennsylvania; and we will ignore the fact that Nevada accorded no recognition to the Pennsylvania decree, an action which is precisely what we have been called upon, in this suit, to examine. We have no power to change this situation: the judgments of the state courts have already worked the changes.

In other words, Nevada decrees are valid in Nevada, Pennsylvania's in Pennsylvania; and if they conflict, that's too bad: we have returned, in essence, to the doctrine of

Divisible Divorce. For all practical purposes, we have overruled *Sutton v. Leib*; by the simple device of refusing to take jurisdiction, we need no longer accord Full Faith and Credit to the first final decree entered by the court possessing jurisdiction over the subject matter and, *in personam*, over both parties.

It is respectfully submitted that your Honorable Court should not, on this fundamental Constitutional issue, permit one of its own landmark decisions to be totally emasculated in its intended application in this fashion. A situation has been created which cries out for review.

In passing, petitioner is constrained to point out that if the federal courts are as powerless to alter the effect of conflicting state decrees as the Majority apparently believe, we are witnessing a monumental exercise in legislative futility: the Federal Declaratory Judgments Act is, except in cases involving original federal decrees, quite useless. And since divorce cases *never* originate in federal courts, *Southard v. Southard* (see *infra*) is quite wrong.

3. The question of dollar volume in controversy develops a most interesting comparison with *Southard v. Southard*, 305 F(2d) 730 (2d Cir. 1962).[8] This case is indeed cited in the Majority Opinion for a principle for which it undoubtedly stands: i.e., that under the Federal Declaratory Judgments Act jurisdiction exists and must be exercised, even though the conflicting decrees involved govern marital status and rights. The Majority carefully avoided giving it effect, however, and approval of this decision was not manifest at oral argument in the case at bar.

In the *Southard* case, the necessary jurisdictional amount was averred (as in the instant case) and not denied (as in

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[8] Analyzed in Appellant's Reply Brief, pp. 8, 9.

the instant case); and this was regarded as sufficient to establish dollar amount for that court, which commented on the matter specifically.

In the case at bar, however, the Federal District Court was not preliminarily satisfied and ordered the parties to brief the dollar amount in controversy question (C.A. 85, 86). This the parties did, *both agreeing that the necessary amount in controversy existed.*

The foundation for this assertion lies in the fact that the marital property in Pennsylvania was held as a *common-law tenancy by the entireties, per tout et non per my;* that consequently, the entire clear value of the property—100%—was the property of petitioner, and amounted to some $25,000.00; that this title could not be altered by any action of the parties as long as they remained married (it being impossible in Pennsylvania for such a title to exist between unmarried parties); *but that upon dissolution of such marriage through divorce, by operation of statute (which the Majority Opinion even cites), the title is automatically converted into a tenancy in common, each party being conclusively presumed to own one-half (in this case, $12,500).*

Petitioner's affidavit to this effect (C.A. 95, 96, set forth *in extenso, supra, this Petition*) was filed, admitted, and its accuracy was supported by respondent (C.A. 97, 98); and the opinion of the trial court below specifically so found (C.A. 156). *No evidence to the contrary was ever introduced into the record.*

Nevertheless, the Court of Appeals, on its own motion, as the Majority Opinion indicates, took notice of the question once again. The contrast in practice with that followed in the *Southard* case is striking: the acceptance of the bare averment and lack of denial in *Southard*, as opposed to the demand for proof, meticulously responded to and overwhelmingly proved, without contradiction, in the case at bar. But the result of this investigation by the

Majority, on the foregoing record, petitioner submits, defies rational comprehension: "That there are no facts in" (petitioner's) "affidavits from which the conclusion could follow that his interest as a tenant in common was worth at least $10,000 less than his interest as a tenant by the entirety!" (Appendix A).

Since the material portion of his affidavit has already been set forth *supra* at pp. 7, 8 of this Petition, this conclusion reduces us to mere speculation as to its source.

It can be conjectured that the Majority does not understand the nature of a common-law tenancy by the entireties, in which each party owns an undivided 100% interest.

It can be conjectured that the Majority was incapable of making the mathematical division of $25,000 into two equal portions of $12,500 each.

Both of these conjectures are rejected by petitioner as manifestly impossible.

It can, however, also be conjectured that the Majority, if compelled to admit that the necessary amount in controversy existed, would face the alternative of finding (a) that the *Southard* application of *res judicata* would force the recognition of the Pennsylvania decree and the nullity of the Nevada decree (following the principle of *Sherrer v. Sherrer,* 334 U.S. 343, 68 S. Ct. 1094 (1948) and all of the other cases cited in *Sutton v. Leib, supra*) in accordance with existing law; or (b) validating the Nevada decree and rejecting the Pennsylvania decree, in flat conflict with the *Southard* case, and in defiance of all the Supreme Court cases cited in Appellant's Opening Brief; that they were disinclined to alternative (a), and felt it legally impossible to adopt (b). Such conjecture visualizes that they chose instead to abdicate their judicial responsibility to decide this Constitutional question, by refusing to exercise juris-

diction in a case in which *Southard* says it must be exercised, under the mere pretext of lack of dollar volume.

No other conjectures exist, even in the realm of the imagination.

4. Petitioner recognizes that, in the process of exploring the reasons why he believes a Writ should issue:—the unique and yet general nature of the Constitutional question presented, although one of first impression; the rationale behind the finding of "collateral" rather than "direct" property interest employed by the Majority Opinion which, if allowed to stand as authority, will inevitably, through the use of this very device, nullify the effect of a leading Supreme Court case; and the basic conflict between it and a Second Circuit decision, only covertly concealed by a transparently inaccurate mathematical computation of dollar value: that he has already exposed most of the basis for his claim that the Majority view was legally unsound. Little remains to be added.

It is hornbook law that a court, in placing value upon an interest in real property, is obliged to look to the law of the state where that property is located. That state, in this case, is the Commonwealth of Pennsylvania. The law of that state fixes the value of petitioner's interest in his property at $25,000 under the Pennsylvania decree, and at only $12,500 under the Nevada decree. A declaration of the validity of the Pennsylvania decree (which specifically froze petitioner's title to the larger interest, and forebade alteration of that title) was and is undeniably and directly in issue here; so, too, is that of the Nevada decree, which by its very existence altered that title to the smaller interest. No reputable title company would insure title to a purchaser in any attempted conveyance, and no possibility exists for a division between the parties of the net proceeds

of such a sale without further protracted and expensive litigation. These problems petitioner sought to avoid by instituting the present action. Largely for these reasons, he believes, the three operative sentences of the Dissenting Opinion totally demolish the reasoning of the five-page Majority Opinion.

On logical grounds alone, however, both the "collateral" and "lack of requisite amount of $10,000" bases of the Majority Opinion are entitled to but short shrift. Two simple syllogisms should suffice to illustrate:

(1) *Major Premise:* We are asked to extend extra-territorial recognition to a decree which, the record shows, includes, among other terms, the fixing of title to real property. *Minor premise:* Among those other terms are provisions dealing only with the right to secure a divorce in Nevada and remarry on the basis of that divorce. *Conclusion:* Therefore, the terms fixing title to the real property are *collateral* to (i.e., not directly involved in) our consideration of the extra-territorial validity of the decree, which involves only the divorce problem.

(2) *Major Premise:* Petitioner has a property interest worth $25,000 if the Pennsylvania decree is valid, and the Nevada decree is invalid. *Minor premise:* Petitioner has a property interest worth $12,500 if the Nevada decree is valid, and the Pennsylvania decree is invalid. *Conclusion:* Therefore, petitioner has not demonstrated that he will suffer a loss in excess of $10,000 if the Nevada decree is held to be valid, and we accordingly lack jurisdiction to consider his suit.

We cannot avoid noting that both conclusions are not only fallacious; they do not arise from the premises. Aristotle would shudder at them. Yet they are, incontestably, the conclusions reached by the Majority in determining that federal jurisdiction in the case at bar is lacking.

WHEREFORE, for all of the foregoing reasons: the unique nature of the Constitutional question involved, which is not only one of first impression but affects general legal procedure nationally, in cases of marital dispute; the *de facto* nullification of a Supreme Court decision by this Court of Appeals judgment; the basic conflict between the instant judgment and that of a Second Circuit case involving some of the same issues; and the distorted application of the statutory requirements for federal jurisdiction (which, if this decision is allowed to stand without review, will inevitably serve as authority for identical or very similar distortions in all such future cases): petitioner respectfully prays that this Court grant review on Writ of Certiorari of the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22415

IRVIN RAPOPORT,

Appellant,

v.

ROSE RAPOPORT, also known as JOAN SIROTT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Before: KOELSCH AND HUFSTEDLER, Circuit Judges, and HAUK,* District Judge

HUFSTEDLER, Circuit Judge:

Irvin Rapoport ("Irvin") sued Rose Rapoport ("Rose") in the Federal District Court in Nevada seeking a declaration that Rose's Nevada divorce decree against him was void for want of jurisdiction of the subject matter and further seeking a declaration that an injunction issued by a Pennsylvania court restraining Rose from proceeding with

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* Hon. A. Andrew Hauk, United States District Court Judge, Los Angeles, California, sitting by designation.

her Nevada action was entitled to full faith and credit. The District Court concluded that it had jurisdiction and decided the case on the merits against Irvin. He appeals.

Federal Jurisdiction was based on diversity of citizenship. 28 U.S.C. §1332(a)(1). Because we hold that federal jurisdiction was lacking due to the absence of the requisite amount in controversy, we do not reach the merits of the litigation.

At all material times Irvin has been a resident of Pennsylvania, the state of the matrimonial domicile. In December 1963 Rose filed a divorce suit against Irvin. He answered, and the suit has been pending ever since. Rose left Pennsylvania for Nevada in the spring of 1964. In May 1964 she commenced a divorce suit in Nevada. Irvin was not personally served in Nevada, and he never appeared in the Nevada courts. When he was constructively served with the Nevada suit, he filed suit in Pennsylvania to obtain an injunction restraining her from prosecuting any divorce proceeding except that pending in Pennsylvania. He served Rose by serving her attorney of record in her Pennsylvania divorce suit and by sending her in Nevada a copy of the complaint. Rose defaulted. Without any findings about Rose's domicile, the Pennsylvania court issued an injunction in accordance with Irvin's prayer, and copies of the decree were served in a manner similar to that of the initial summons and complaint. Rose thereafter completed the Nevada proceeding and obtained a divorce decree. She later remarried. She has lived in Nevada continuously since she moved there in 1964.

During their marriage Rose and Irvin acquired a parcel of Pennsylvania real property to which title was taken as tenants by the entirety. Under Pennsylvania law, a divorce decree automatically converts a tenancy by the entirety

into a tenancy in common.[1] Irvin averred that the combined interests of the parties in that property were worth $25,000.

Irvin claimed that the Nevada decree was void because Rose had not been a bona fide domicilliary of Nevada for enough time to confer on Nevada jurisdiction of the marital res and that Nevada had failed to accord full faith and credit to the Pennsylvania decree enjoining Rose from prosecuting the Nevada suit.

A suit attacking a state court judgment as void for want of subject matter jurisdiction lies within the federal province, if the other requisites for federal jurisdiction are present. (*Simon v. Southern Ry.*, (1915) 236 U.S. 115; *Daniels v. Thomas*, (10th Cir. 1955) 225 F.2d 795, *cert. denied*, (1956) 350 U.S. 932). Jurisdiction thus grounded is not lost simply because the judgment attacked is a divorce decree. (*Southard v. Southard*, (2d Cir. 1962) 305 F.2d 730).

Diversity of citizenship was present and the subject matter of the suit was within federal ken. There remains the inquiry into the pecuniary component of diversity jurisdiction, which this court noticed on its own motion (*e.g.*, *McNutt v. General Motors Acceptance Corp.*, (1936) 298 U.S. 178) and as to which the parties have filed briefs in response to our order. At this juncture the parties have joined forces to convince us that there is an amount in controversy satisfying the requirements of 28 U.S.C. §1332 (a)(1).

The first contention is that a declaration of marital status is worth more than $10,000 to each of the parties, because

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[1] 68 Pa. Stat. Ann. §501; Collins v. Wilkinson (1950) 366 Pa. 108, 76 A.2d 649. Under the same statute, either former spouse may thereafter seek partition of the common property in a suit in equity filed against the other.

an adjudication of status potentially affects the support obligations of Irvin and of Rose's second mate. The argument fails for the reason crisply stated in 1 Moore's *Federal Practice*, (1964) ¶0.92[5], p. 842: "Where a matter in dispute is of such a nature as to be incapable of being reduced to a pecuniary standard of value, jurisdiction cannot be predicated on any statute containing an amount in controversy requirement." A declaration of marital status is patently beyond pecuniary measure. (See *De La Rama v. De La Rama*, (1906) 201 U.S. 303, 307; *cf. Barry v. Mercein*, (1847) 46 U.S. (5 How.) 103, 120).

The second contention is that the interests of the parties in the Pennsylvania real property will be directly affected by the declaration in a pecuniary amount more than $10,000. The contention fails because (1) the declaration affects the parties' interests collaterally and not directly, and (2) the interest in controversy was not shown to be worth $10,000 or more.

It is well settled that the amount in controversy requirement cannot be met by taking into account any collateral effect which may follow adjudication, whether by way of estoppel of the parties or otherwise. (1 Moore's *Federal Practice, supra*, ¶0.91[2], pp. 828-31). The parties argue that the interests in the realty are directly affected by an adjudication of status, because, under Pennsylvania law, a decree of divorce automatically changes the nature of their tenancy. A decree of divorce may change the nature of the parties' tenancy, but nothing in the Pennsylvania law suggests that a federal declaration of marital status has any such effect. Indeed, it is hard to see how it could. A federal decree declaring that the Nevada decree is valid could not affect the title at all. The Nevada decree accomplished the change, and not the federal decree. A federal decree declaring that the Nevada decree was void has no

necessary effect on title. The Pennsylvania law obviously gives effect only to valid divorce decrees. If a divorce decree is void, it is a complete nullity from its outset. In theory nothing happened to the title at the issuance of the void decree, and a federal court's saying so does no more than state a condition which existed all along.

The supervening reason why the value of the interests in the Pennsylvania property cannot be used to fulfill the monetary requirement is that that property and the respective interests of the parties in it was not directly the matter in controversy. Even if the federal court could have adjudicated the interests of the parties in the real property, a dubious assumption, it was not asked to do so in this case. The only matter directly in controversy was the validity of Rose's divorce. The property was, at the most, indirectly affected.

Even if the property had been directly in dispute, there was a complete failure by Irvin to establish that the value of his affected interest was at least $10,000. Jurisdiction was challenged in the District Court. It was Irvin's burden to prove the amount in controversy. (*McNutt v. General Motors Acceptance Corp.*, (1936) 298 U.S. 178). His affidavits are completely inadequate to carry his burden. At most, the facts stated are that the whole of Rose's and his interests are worth $25,000 and his interest as a tenant in common, if such he be, is worth at least half that sum. Were the property interests in controversy, the amount in controversy was the value of the interest which Irvin stood to gain or lose by the litigation. (1 Moore's *Federal Practice, supra,* ¶0.91[1], pp. 826-27). He could not lose the value of his interest as a tenant in common, because he still owns that interest if the divorce was valid. All he could win or lose was the difference in value between his interest as a tenant in common and his interests as a husband-tenant by the entirety. (*Cf. Carne v. Russ,* (1894) 152

U.S. 250; 1 Moore's *Federal Practice, supra,* ¶0.95, pp. 864-65). There are no facts in his affidavits from which the conclusion could follow that his interest as a tenant in common was worth at least $10,000 less than his interest as a tenant by the entirety.

In view of our disposition of the controlling issues, the remaining contentions of the parties do not require discussion.

Each party shall bear his own costs on appeal.

The decree is reversed and the cause is remanded to the District Court with directions to dismiss the suit for want of jurisdiction.

APPENDIX B

Dissenting Opinion

(Amended and Filed Nov. 4, 1969)

I dissent.

As a tenant by the entireties in fee in the Rapoport real property, Irvin's interest is of the whole worth at least $25,000 [*Walker's Estate,* 340 Pa. 13, 16 A.2d 28 (1940); *C.I.T. Corp. v. Flint,* 333 Pa. 350, 5 A.2d 126 (1939)]; as a tenant in common his interest is but half with a correspondingly lesser value. Manifestly the difference adequately meets the monetary requirements of the diversity statute.

And I submit that the suit directly involves the property, for the true nature of the parties' present interests necessarily hinges upon the outcome. The appeal should be entertained.

By: M. Oliver Koelsch /s/
M. OLIVER KOELSCH
United States Circuit Judge

APPENDIX C

Judgment
(Filed Aug. 20, 1969)

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded to the District Court with directions to dismiss for lack of jurisdiction.